No. 22052 A-B-C-D-E-F-G

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

JOHN VAN GELDER, IRVING G. ROBERTSON, ALBERT G. BEATTIE, and ROBERT O. GILMORE, JR., et al.,	)
Appellants,	)
vs.	)
RICHARD A. McGEE, Administrator, LAWRENCE E. WILSON, Warden, and PEOPLE OF THE STATE OF CALIFORNIA, et al.,	)
Appellees.	)

BRIEF OF THE AMERICAN CIVIL LIBERTIES

UNION OF NORTHERN CALIFORNIA

AMICUS CURIAE.

MARSHALL W. KRAUSE
PAUL N. HALVONIK
American Civil Liberties Union
of Northern California
503 Market Street
San Francisco, California 94105

Attorneys for Amicus Curiae

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UNITED STATES COURT OF APPEAL

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Appellants,	MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE
vs.	
RICHARD A. McGEE, Administrator, LAWRENCE E. WILSON, Warden, and PEOPLE OF THE STATE OF CALIFORNIA, et al.,	
Appellees.	

The American Civil Liberties Union of Northern California respectfully moves for leave to participate in this matter as amicus curiae. Attorneys for appellants welcome such participation; attorneys for appellees neither welcome nor object to such participation; no objection was raised when the American Civil Liberties Union of Northern California participated in this matter as amicus curiae in the district court.

Amicus is a non-profit organization devoted to the preservation of the liberties and rights guaranteed by the Constitution. The immediate case raises important constitutional questions in a delicate and dynamic field. Additionally, it raises an important

procedural question, the resolution of which will affect a great deal of constitutional litigation.

STATEMENT OF CASE

Appellants have set forth the facts and posture of this case in their opening brief. No purpose would be served by a reiteration of those facts and amicus therefore incorporates the case and facts as set forth in that document.

SUMMARY OF ARGUMENT OF AMICUS CURIAE

The Denial of Plaintiffs' Motion for the Convening of a Three-Judge District Court was Improper.

Plaintiffs are seeking to enjoin the enforcement, operation, and execution of an administrative order of general applicability representing considered state policy. A three-judge court is the only sort of court that has jurisdiction over such a matter. 28 U.S.C. 2281. Marshall v. Sawyer, 201 F. 2d 639, 644 (9th Cir. 1962); Hatfield v. Bailleaux, 290 F. 2d 632 (9th Cir. 1961).

In his order denying the motion to convene a three-judge court, Judge Wollenberg did not question the appropriateness of a three-judge court if the complaint of plaintiffs raised a substantial question of constitutional law. He concluded that it did not, relying upon the standards established in California Water Service Company v. City of Redding, 304 U.S. 252 (1938) and Ex Parte Poresky, 290 U.S. 30 (1933).

That conclusion was erroneous. His action was in effect, a dismissal on the merits. Only a three-judge court is empowered to make such a ruling. Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930); Ex Parte Northern Pacific RR, 280 U.S. 142 (1929); Ex Parte

Metropolitan Water Company, 220 U.S. 539 (1911); and see Ganz v. Kirk, 375 F. 2d 728, 729 (1967).

California Water Service and Poresky are not inconsistent with this well-established principle. On the contrary, the court in Poresky noted:

> The district judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within section 266 of the Judicial Code, a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be. Ex Parte Poresky, Supra at 31.

The court in Poresky, however, concluded that the district judge had correctly dismissed "for the want of jurisdiction". The court went on to say:

> ...the provision requiring the presence of a court of three judges necessarily assumes that the district court has jurisdiction. In the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented.

Since a federal judge must dismiss for want of jurisdiction any complaint that raises no substantial constitutional question and lacks any other jurisdictional ground, he can do so whether or not a three-judge court is requested.

In announcing the jurisdictional rules in California Water Service and Poresky the court did not fashion a special rule for cases involving three-judge courts. In California Water Service the court advanced this standard: "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." Id, at 255. The same rule was propounded in Poresky. Ex Parte Poresky, supra, at 32. It

was a reiteration of the standards contained in three cases cited by the Court. Levering and Garrigues Co. v. Morrin, 289 U.S. 103 (1933); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910); McGilvra v. Ross, 215 U.S. 70 (1909).

None of those cases involved a request for a three-judge court. None of them involved questions appropriate for a three-judge court. The same jurisdictional rule of "substantial federal question" applies in three-judge or one-judge cases. Cf. Baker v. Carr, 369 U.S. 186 (1962). See Currie, "Three-Judge District Court in Constitutional Litigation." 32 U. Chi. L. Rev. 1; Comment, "The Three-Judge District Court and Appellate Review," 49 Va. L. Rev. 538, 558-564 (1963).

In Bell v. Hood, 327 U.S. 678 (1946), the United States Supreme Court explained what the "substantial federal question" rule means:

> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well-settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction...
>
> * * * *
>
> Respondents' contention does not show that petitioners' cause is insubstantial or frivolous, and the complaint does in fact raise serious questions, both of law and fact, which the district court can decide only after it has assumed jurisdiction over the controversy...
>
> * * * *

> [T]he right of the petitioners to recover under their complaint will be sustained if the constitutional laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction. id 682-684.

The Bell criteria for dismissal on the grounds of a lack of substantial federal question have consistently and recently been followed by the United States Supreme Court, see, e.g., Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963) and Baker v. Carr, 369 U.S. 186, 199 (1962),(reversing a three-judge court's determination that it lacked jurisdiction), and this Court, see, e.g., Miller v. County of Los Angeles, 341 F. 2d 964 (9th Cir. 1965); Hicks v. City of Los Angeles, 240 F. 2d 495, 497 (9th Cir. 1957); Lowe v. Manhattan Beach City School District, 222 F. 2d 258, (9th Cir. 1955).

When this rule of substantiality as limned in Bell is applied to the instant action it becomes abundantly clear that the decision of the District Court was erroneous. There is no recent United States Supreme Court decision that controls this litigation. The last "access to the courts" decision rendered by the United States Supreme Court was Ex Parte Hull, 312 U.S. 546 (1941). In that case the court extended the notion of "access to the courts" to sustain the petitioners' challenge of a prison regulation. Its only relevance to the immediate action is that it buttresses the claim of plaintiffs. In order to find that a federal question raised by a complaint is insubstantial because of a recent ruling of the United States Supreme Court, that ruling must clearly foreclose the claim of the plaintiffs. The prior decision must be on all fours, it must settle once and for all the constitutional questions raised in the complaint. See

Stamler v. Willis, 371 F. 2d 413 (7th Cir. 1966); cf. Dombrowski v. Eastland, __U.S.__, 18 L. Ed. 2d 577 (1967); Baker v. Carr, 369 U.S. 186, especially at 199, 202-204 (1962).

This case, then, does not come under the rubric of the first criterion used to exclude complaints because of lack of a substantial Federal question. Nor does it come under the remaining criterion, it is not "obviously without merit," Ex Parte Poresky, Supra, at 32.

Judge Wollenberg's conclusion that a substantial federal question had not been presented was undoubtedly influenced by the decision of this Court in Hatfield v. Bailleaux, 290 F. 2d 632 (9 Cir. 1961). Initially, it should be observed that the Hatfield ruling is not the sort of "recent" ruling that can foreclose consideration of the constitutional issues raised by the plaintiffs. It is only recent decisions of the United States Supreme Court which can, in themselves, result in the conclusion that a question presented is insubstantial. California Water Service Company v. City of Redding, supra; Ex Parte Porefsky, supra. This rule makes especially good sense where the questions raised are appropriate for determination by a three-judge court, since review in such cases is directly to the United States Supreme Court.

Hatfield, then, for purposes of determining whether or not the plaintiffs raised a substantial federal question, is significant only to the extent that it is a persuasive authority against the plaintiffs' claim. But Hatfield does not stand for the proposition that regulations of law book use can never interfere with reasonable access to the courts. The court in Hatfield reviewed the particular

regulations there under attack and concluded that they did not interfere with reasonable access by prisoners to the courts. Hatfield implicitly holds that regulations of law book use by prisoners can interfere with reasonable access to the courts and this Court explicitly stated: "Whether or not in a particular case the access afforded is reasonable depends on all of the surrounding circumstances." Id, at p. 637. Hatfield, therefore, is consistent with other cases holding that the regulation of law book use may violate due process of law. United States v. Mayberry, 225 F. Supp. 752 (E.D. Pa. 1963) and see Gaito v. Prasse, 312 F. 2d 169 (3 Cir. 1963); Barone v. Warden, Manhattan House of Detention for Men, 209 F. Supp. 309 (S.D. N.Y. 1962); Note, "Constitutional Rights of Prisoners: The Developing Law," 110 U. Pa. Law Rev. 985, 992-995 (1962). Hatfield does not even hint that the constitutional challenge brought in the federal district court should have been dismissed for want of jurisdiction. Additionally, Hatfield is predicated on the theory that a prison regulation with the purpose of discouraging "cell-house lawyers" is entirely proper. Id, at 639. A contrary decision in the recent case of Johnson v. Avery, 252 F. Supp. 783 (N.D. Tenn. 1966) underscores the fact that the matter is at least "open to discussion", McGilvra v. Ross, Supra at 80.

CONCLUSION

Since plaintiffs allege that the complained-of regulations interfere with their access to the courts and since it cannot be

said that such a complaint is frivolous or that the constitutional question it raises are not even open to debate, the order of the District Court should be reversed.

Respectfully submitted,

MARSHALL W. KRAUSE

PAUL N. HALVONIK

September 12, 1967

By_____
(Paul N. Halvonik)
Attorneys for Amicus Curiae

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____
Paul N. Halvonik

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STATE OF CALIFORNIA)
)ss.
CITY AND COUNTY OF SAN FRANCISCO)

I am a citizen of the United States and a resident of the City and County aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 5013 Market Street, San Francisco, California 94105.

On September 12, 1967, I served the within Brief of American Civil Liberties Union of Northern California, Amicus Curiae, on the Appellees in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Thomas C. Lynch
Attorney General of the State of California
Library and Courts Building
Sacramento, California 95814

John E. Wahl, Esq.
1255 Post Street, Suite 1128
San Francisco, California 94109

I certify under penalty of perjury that the foregoing is true and correct.

Dated at San Francisco, California September 12, 1967.

(Shirley A. Dye)